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SUPREME COURT OF THE UNITED STATES

October Term, 1931

No. 736

I. RUDE, PETITIONER,

vs.

JOSEPH BUCHHALTER, THE FIRST NATIONAL BANK OF DENVER, A BANKING CORPORATION; G. DEXTER BLOUNT, HARRY SILVERSTEIN AND DAVID ROSNER, CO-PARTNERS DOING BUSINESS AS BLOUNT, SILVERSTEIN AND ROSNER, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ERNEST MORRIS,
CASS E. HERRINGTON,
C. E. WAMPLER,
CASS M. HERRINGTON,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, I. Rude, brings this petition for a writ of certiorari to review a decree of the Circuit Court of Appeals for the Tenth Circuit, and shows as follows:

(A.)

Summary Statement of the Matter Involved.

The major questions involved are these: Does not the due process clause of the Constitution prohibit the Circuit Court of Appeals from making a decree which absolutely requires one party to pay the expenses of litigation and counsel fees of the other party, where such relief is granted *sua sponte* without any hearing or opportunity to be heard thereon? May the Court make such a decree even after a hearing? These questions, and others hereinafter presented, arise in the following manner:

The decree sought to be reviewed was rendered on December 17, 1931, by the Circuit Court of Appeals for the Tenth Circuit, in a cause numbered 506 upon the docket of that Court wherein Joseph Buchhalter was appellant and I. Rude was appellee (R. 276). The opinion of the Court is found at page 269 of the Record but has not yet been reported. Petitioner filed a petition for rehearing (R. 281) which was denied January 23, 1932 (R. 303, 307). The said decree condemns petitioner to pay "the expenses to which Joseph Buchhalter and the First National Bank of Denver, Colorado, have been put in this litigation, including reasonable attorneys' fees to be determined by the trial Court" (R. 276), upon the alleged ground that Rude's suit was not brought in good faith (R. 275).

The trial Court (District Court of the United States for the District of Colorado) by its decree, merely dismissed the suit at plaintiff's (petitioner's) costs (R. 45), which was the only relief demanded

by Joseph Buchhalter, defendant-appellant-respondent (R. 21, 273), and, by refusing Buchhalter's tendered findings of fact and conclusions of law and by denying Buchhalter's Motion to Amend Final Decree, the District Court twice expressly refused to find that Rude's suit was not brought in good faith (R. 38, 45, 47).

Basis of the Suit.

Petitioner and respondent Buchhalter had been joint and nearly equal owners of an undivided one-half interest in the properties of the Colorado Pulp and Paper Company which they acquired by turning in bonds of the Company at a Master's sale. The legal title to said *one-half* interest stood in the name of petitioner Rude who conveyed it to respondent Buchhalter and received back Buchhalter's promissory note for $67,500.00 secured by a deed of trust on a *one-fourth* interest. Buchhalter sold the one-half interest to one Binstock for substantially $28,000.00 cash and $92,500.00 in bonds of a new corporation to which Binstock and one Bronstine, owner of the other one-half interest, transferred the property. To enable the sale from Buchhalter to Binstock to be consummated, Rude surrendered said note and executed a request for a release of said deed of trust under an arrangement whereby the entire proceeds of said sale were placed in escrow with respondent the First National Bank of Denver, one of the defendants in the trial Court. The terms of the escrow were that the bank should hold said funds until Rude and Buchhalter should agree in writing as to the disposition thereof. Rude had consented that Buchhalter might make such

sale upon the condition that Rude receive $40,000.00 in cash (or at least all cash paid by Binstock) and Buchhalter's note for the balance due Rude, payable in six months or a year. Rude had repeatedly refused to accept any bonds (R. 63, 114, 120, 121, 122, 181). November 18, 1929, at Buchhalter's request, Rude, a resident of Dallas, Texas, came to Denver to make settlement with Buchhalter. They went to the bank, the escrow holder, and drew out all of the cash except $100.00. $11,615.22 was retained by the bank to discharge an indebtedness of Buchhalter's secured by his collateral. Rude received the balance, $16,365.34 (R. 4, 18).

The bill alleges that at the bank, it was agreed by and between Rude and Buchhalter that, if Rude would allow Buchhalter to have enough of the cash to discharge said Buchhalter's indebtedness to the bank, Buchhalter would secure a release of said collateral, sell the same on the next day and thus pay Rude in cash the balance due him, and that meantime the bonds should remain in the bank as security for Buchhalter's said promise.

The bill further alleged that it was impossible for Rude and Buchhalter to agree concerning disposition of the funds in escrow. The suit was to recover from Buchhalter the balance which Rude claimed, and to enforce an equitable lien on said bonds.

The bank was made a party because it was the escrow holder. Blount, Silverstein & Rosner were made parties because they had caused a writ of attachment, issued out of the State Court in a

suit against Rude and Buchhalter, to be executed by a levy on these bonds in the bank.

Buchhalter's answer denied the agreement alleged in the bill, averred that he and Rude were joint owners of the proceeds received from the sale to Binstock and alleged that Rude was in Court with unclean hands. Although suit was not on the $67,500.00 note—could not have been because the bill alleged and the answer admitted that the note had been canceled pursuant to the foregoing arrangement (R. 3, 17)—Buchhalter based his unclean hands defense upon the false premise that suit was on the note and that the same was but a fictitious instrument. Both the trial Court and the Court of Appeals held that the suit was on the agreement alleged to have been made at the bank (R. 261, 271), thus rejecting Buchhalter's contention that suit was on the canceled note.

January 30, 1931, the District Court, in a memorandum opinion, held that the agreement alleged in the bill had not been established by the required amount of evidence and that the bill should be dismissed (R. 255, 262). Thereafter, on April 7, 1931, the date of the decree of the District Court, Buchhalter for the first time disclosed that his defense had been pleaded and conducted in the hope that he could secure a decree awarding all of the bonds to him, thus depriving Rude of all interest in the escrow. This disclosure was made in Buchhalter's requested findings of fact and conclusions of law (R. 38) and in his Motion to Amend Final Decree (R. 45). Failing to realize that hope, Buchhalter promptly (within six days) appealed

to the Circuit Court of Appeals (R. 47-53). Buchhalter's assignment of errors discloses that, aside from some complaints as to the findings (from which no appeal lies) the sole object of his appeal was to obtain a decree "that the legal title to all and singular of said mentioned funds and bonds in escrow, be held and declared to be in this defendant and appellant (Buchhalter); that the First National Bank of Denver, Colorado, as escrow holder of said funds and bonds, be directed and required to turn over and deliver unto this defendant (Buchhalter), all and singular, the same; * * *" (R. 53).

Buchhalter made nobody a party to his appeal except Rude. Obviously, therefore, even if there had otherwise been legal grounds therefor, the Appellate Court was without jurisdiction to grant Buchhalter any relief because of the absence of indispensable parties, namely, the First National Bank of Denver, escrow holder, and Blount, Silverstein & Rosner, holders of the attachment lien. Accordingly Rude filed in the Circuit Court of Appeals a motion to dismiss Buchhalter's appeal upon the grounds: (a) that, having obtained all the relief sought by his pleading, Buchhalter was without right of appeal; (b) that there had been no summons and severance; (c) absence of indispensable parties; and (d) said appeal was frivolous (R. 265-268). This Motion to Dismiss was argued in the Appellate Court (R. 269) but that Court refused to pass upon it (R. 307).

June 18, 1931, Rude filed a cross appeal from the decree of the District Court and sought to obtain the relief prayed for in his bill (R. 237, 239-

250), or in the alternative that "equity having jurisdiction, having all of the parties and the evidence before it, should order disposition of these funds and bonds in accordance with the respective rights of the parties" (R. 304). To Rude's appeal he made parties all who were parties in the trial Court. Rude's appeal, therefore, being the only one which brought all parties before the Circuit Court of Appeals, was the only one in which any relief could properly be granted, but the Court disposed of Rude's appeal by affirming the decree of the District Court at Rude's costs (R. 277). The sole relief was granted in Buchhalter's appeal (R. 276) wherein, as has been made to appear, the Court had no jurisdiction.

Precise Questions for Determination.

1. May a court of equity under any circumstances require the plaintiff to pay defendant's expenses of litigation and counsel fees merely because it is of the opinion that the suit was not brought in good faith?

2. May a Circuit Court of Appeals do so where, as a basis for such decree, it must first make findings of fact which the District Court expressly refused and the evidence justifies such refusal?

3. May such Appellate Court *sua sponte* decree the payment of such expenses and attorneys' fees without violating the due process clause of the Constitution?

4. May such Appellate Court, on appeal by the successful party and in the absence of indispensable parties, disregard appellee's motion to dis-

miss and award the appellant affirmative relief, at appellee's costs, which appellant did not seek in either court?

5. May a court of equity, under the guise of imposing conditions, make an absolute decree requiring the payment of such expenses and counsel fees without giving the party so condemned the option to reject the so-called conditions and all relief?

6. May the Circuit Court of Appeals award relief to a party who does not appeal and is not even a party to the appeal?

(B.)

Reasons Relied on for the Allowance of the Writ.

1. The decree awarding *expensa litis* and counsel fees was entered by the Court *sua sponte* without any hearing or opportunity therefor and hence is in violation of Amendment V of the Constitution.

2. The decree was entered without jurisdiction because:

(a) Respondent Buchhalter, the appellant, obtained all the relief which he sought in the trial Court. Not being a party aggrieved he had no right of appeal.

(b) Indispensable parties—namely, the bank and Blount, Silverstein & Rosner—were absent from the Circuit Court of Appeals.

(c) Counsel fees in behalf of the First National Bank *were* sought in the District Court, but denied (R. 38, 43). The bank did not appeal and

made no appearance in the Circuit Court of Appeals. Hence, the decree of the District Court is *res judicata* that the bank is not entitled to such fees. Nevertheless, the decree of the Circuit Court of Appeals awards them and in this respect is contrary to the decisions of this Court in *United States v. Blackfeather*, 155 U. S. 180; *Clark v. Wilson*, 103 U. S. 766; *the Stephen Morgan v. Good*, 94 U. S. 599; and *the Maria Martin v. Northern Transp. Co.*, 12 Wall. 31.

3. The right of the Court to make one party bear the other party's expenses of litigation is an *important question of general law*. The way in which this question was decided by the Circuit Court of Appeals is untenable and in conflict with all precedent (15 C. J. 114, Sec. 248).

4. The decision allowing such expenses including attorney's fees is contrary to applicable decisions of this Court.

Oelrichs v. Williams, 15 Wall. 211.
Arcambel v. Wiseman, 3 U. S. 306.
Hauenstein v. Lynham, 100 U. S. 483.

5. If this Court should be of the opinion that this question is not entirely settled by the foregoing decisions, the matter is of such importance that it should be settled by this honorable Court.

6. In refusing to pass upon the Motion to Dismiss Buchhalter's appeal, the Circuit Court of Appeals has allowed an appeal from a decree wholly in said appellant's favor; and its decision is contrary to the decision of this Court in *Corning, et al., v. The Troy Iron and Nail Factory*, 15 How. 451,

and contrary to the decisions in the Eighth Circuit in *Houchin Sales Co. v. Angert*, 11 Fed. (2d) 115; *Guarantee Co. of Nor. Amer. v. Phenix Ins. Co.*, 124 Fed. 170, 59 C. C. A. 376; *Rogers v. Penobscot Mng. Co.*, 154 Fed. 606, 83 C. C. A. 380, and contrary to the decision of the First Circuit in *Harding v. Fed. Nat'l Bk.*, 31 Fed. (2d) 914.

7. The decision of the Circuit Court of Appeals contained in the opinion denying petition for rehearing, to the effect that a Federal Court of Equity may impose its own conditions without giving the party his option to reject them (R. 303-306) is untenable and contrary to all authority.

McPherson v. Cox, 96 U. S. 404.
21 C. J. 668, Sec. 849 Equity.
Gage v. Thompson, 161 Ill. 403.
Alexander v. Merrick, 121 Ill. 606.
Mechanics' Bank v. Lynn, 26 U. S. 376.
Kinney Coastal Oil Co. v. Kieffer, 277 U. S. 488.

8. In all of the foregoing particulars the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, Your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and com-

plete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 506, Joseph Buchhalter, Appellant, v, I. Rude, Appellee, and that the said decree of said Court may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

I. RUDE,
By ERNEST MORRIS,
CASS E. HERRINGTON,
C. E. WAMPLER,
CASS M. HERRINGTON,
Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of the District Court was rendered January 30, 1931 (R. 255) but never officially reported.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit, was rendered

December 17, 1931 (R. 269), but has not yet been officially reported.

The opinion of said Circuit Court of Appeals denying petition for rehearing was rendered January 23, 1932 (R. 303), but has not yet been officially reported.

II.

Jurisdiction.

Jurisdiction is invoked under Judicial Code, Section 240 as amended by the Act of February 13th, 1925, *43 Stat. 938, 28 U. S. C. A. Section 347.*

III.

Statement of the Case.

The statement of the case as contained in the petition for writ of certiorari is sufficient.

IV.

Points Relied Upon and Summary of the Argument.

POINT A: In decreeing, without any hearing or opportunity therefor, that the expenses of the litigation and attorney's fees of Buchhalter and the bank shall be paid out of petitioner Rude's share of the funds and bonds in escrow, the Circuit Court of Appeals deprived petitioner of his property without due process of law in violation of Amendment V of the Constitution.

POINT B: The decree awarding such fees and expenses is contrary to principle and to all precedent.

POINT C: The doctrine that a Court of Equity may grant relief only upon conditions is inapplicable.

POINT D: The Circuit Court of Appeals erred in holding that petitioner had not brought his suit in good faith.

POINT E: The Circuit Court of Appeals erred in holding that "it was the assertion of a false and groundless claim that prevented a distribution of the fund without the aid of equity."

POINT F: The Circuit Court of Appeals erred in disregarding petitioner's motion to dismiss Buchhalter's appeal and in awarding respondent Buchhalter affirmative relief at petitioner's costs.

POINT G: The Circuit Court of Appeals erred in awarding any relief to respondent the First National Bank of Denver.

V.

ARGUMENT.

Point A.

In decreeing, without any hearing or opportunity therefor, that the expenses of the litigation and attorney's fees of Buchhalter and the bank shall be paid out of petitioner Rude's share of the funds and bonds in escrow, the Circuit Court of Appeals deprived petitioner of his property without due process of law in violation of Amendment V of the Constitution.

Respondent Buchhalter never claimed expenses or attorney's fees either in the District Court or in the Circuit Court of Appeals. Neither in his Answer (R. 13-22) nor in his Requested Findings of Fact and Conclusions of Law (R. 38-43) nor in his Motion to Amend Final Decree (R. 45-47) nor in his Assignment of Errors (R. 48-53) nor anywhere else in the case did Buchhalter ask any such relief as that granted by the Circuit Court of Appeals. The first mention of the subject—expenses of the litigation and attorney's fees—is in that Court's opinion (R. 275-276).

The right to be heard is one of the most valuable rights which our Constitution guarantees to all. But the Circuit Court of Appeals has denied petitioner that right. True, petitioner Rude filed in that Court his petition for *re*-hearing, but he was *never heard* thereon and said petition was promptly denied in an opinion wherein the Court said he was not entitled to any hearing on the subject of attorney's fees and/or expenses (R. 306). To award one litigant his attorney's fees and other expenses under the circumstances of this case has never been done either with or without a hearing on the subject. We respectfully submit that to do so without a hearing is to deprive Rude of his property without due process of law in violation of Amendment V of the Constitution of the United States. (*Hovey v. Elliott*, 167 U. S. 409; 42 L. Ed. 215.) For that reason alone, we think the Petition for Certiorari should be granted.

In the *Hovey* case, *supra*, this Court reaffirmed its opinion in *Reynolds v. Stockton*, 140 U. S. 254,

35 L. Ed. 464. In the *Reynolds* case the Court said that a judgment is not valid when it is "not responsive to the issues presented," and quoted with express approval the following language in the case of *Munday v. Vail*, 34 N. J. L. 418:

> "Persons by becoming suitors do not place themselves for all purposes under the control of the Court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises."

When parties enter upon or determine to continue litigation, it should be possible for them to *know* all that the Court could possibly adjudge against them. The pleadings of their adversaries are intended to give litigants this information and are the measure of the Court's power. There is nothing in the pleadings, nor in the briefs, nor anywhere else in the case, which could possibly have given either Rude or his counsel any intimation that expenses or attorneys' fees might be recovered from him. The one thing which Buchhalter claimed in the District Court was that the suit was on the note, that it was a fictitious instrument and that the suit should be dismissed. Both the Circuit Court of Appeals and the trial Court have held that the suit was *not* on the note, as of course it couldn't have been. The only relief which Buchhalter asked was dismissal and, later, Rude's interest in the escrow securities.

Under these circumstances, we respectfully and most earnestly contend that the Circuit Court of

Appeals was without jurisdiction or power to award either expenses or attorneys' fees.

Point B.

The decree awarding such fees and expenses is contrary to principle and to all precedent.

The Circuit Court of Appeals, contrary to the opinion of the District Court, held that the suit was not brought in good faith, i. e., that it was vexatious. We shall presently show that the Circuit Court of Appeals erred in so holding. But, under all of the authorities, even if it were true that the suit was not brought in good faith, was without probable cause, in short, was vexatious, that fact would not be a sufficient predicate upon which to base a decree for expenses and attorney's fees.

The "fee bill" statute (U. S. C. A. title 28, Secs. 571-572) provides:

> "Section 571. Fees to be taxed. The following fees *and no other shall be taxed and allowed to attorneys, solicitors*, and proctors in the courts of the United States, and to district attorneys, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties."

> "Section 572. Attorneys, solicitors, and proctors, * * * on a final hearing in equity * * *, a docket fee of $20.00."

While it is sometimes loosely stated that those sections do not bind courts of equity, such courts have not gone beyond this statute in awarding attorneys' fees except in seven classes of cases (none of which embraces the case at bar) namely:

(1) Where there is another statute authorizing the allowance of attorneys' fees.

(2) Where there is a rule of court.

(3) Where there is a contract.

(4) Where one party has brought a fund into court in which others are allowed to share.

(5) Where a trustee is put to expense concerning the trust.

(6) Where a receiver has been improperly appointed.

(7) In that class of cases where it has been the established practice in equity to allow such fees.

The seventh class is broad enough to include all the others.

The leading case on the subject, often quoted and followed, is *Oelrichs v. Williams*, 15 Wall. 211; 21 L. Ed. 43. That was a suit in equity wherein this Court said:

> "In debt, covenant and assumpsit damages are recovered, but counsel fees are never included. So in equity cases, where there is

no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, *however unjust the litigation on the other side, and however large the expensa litis to which he may have been subjected.* The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the Court to scale down the charges, as might sometimes be necessary.

"We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy." (Italics ours, except the Latin.)

In an earlier case, *Arcambel v. Wiseman*, 3 U. S. 306, 1 L. Ed. 613, the lower Court in its decree allowed "a charge of 1600 dollars for counsel's fees". This Court said of this:

"We do not think that this charge ought to be allowed. The general practice of the

> *United States* is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the Court, till it is changed, or modified, by statute."

In *Hauenstein v. Lynham*, 100 U. S. 483, 491, 25 L. Ed. 628, 631, this Court said:

> "It is a settled rule in this Court never to allow counsel on either side to be paid out of the fund in dispute."

Prior to adoption of the "fee bill" statute, it had been the practice to allow counsel fees in certain cases in admiralty. But since that statute this Honorable Court has held that the Court has no power to award counsel fees beyond those prescribed in that Act of Congress. *The Baltimore v. Rowland*, 75 U. S. 377, 19 L. Ed. 463, 467. In that case the Court said:

> "Fees and costs, allowed to the officers therein named, are now regulated by the Act of the 26th of February, 1853, which provides, in its first section, that in lieu of the compensation now allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners and printers, the following and no other compenation shall be allowed.
>
> "Attorneys, solicitors and proctors may charge their clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed as cost against the opposite

party, as an incident to the judgment, for their services, except the cost and fees therein described and enumerated. 10 Stat. at L., 161."

In *Motion Picture Patents Co. v. Steiner*, 201 Fed. 63, 64, it was held that a court of equity has no power "to award an additional allowance to the prevailing party who has been put to 'considerable annoyance and expense' by reason of the prolonged examination of witnesses by his adversary's counsel."

The only case we have been able to find which contains any language which could possibly be construed to permit the taxation of costs as between solicitor and client, in a case of this character, is *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 28 Fed. (2d) 233 (8th Cir.). That case was one where a *trustee* was awarded expenses and attorney's fees in litigation *concerning the trust* and hence came under the fifth exception above mentioned. And the Decree of the Circuit Court of Appeals was reversed by this Court in *Kansas City Southern Ry. Co. v. Guardian Trust Co.*, 281 U. S. 1, 74 L. Ed. 659. It is true that this Honorable Court did not pass upon the power of a court of equity to award such costs, saying: "Even if it be assumed that federal equity courts have jurisdiction to allow costs as between solicitor and client and to include therein attorneys' fees in excess of the amount prescribed by statute—and as to that we express no opinion—the purpose to authorize such costs and to make such allowance should be clearly expressed in the Decree". The original Decree of the District

Court in that case made no provision for the taxation of such costs. That Decree as affirmed required the "taxation of costs * * * under the principles, rules and practice in equity". Under the mandate it was claimed in the District Court that the above quoted language gave authority to tax costs as between solicitor and client, provided that such could be done "under the principles, rules and practice in equity". The District Court disallowed the application for such taxation, the Circuit Court of Appeals reversed the decree and allowed such costs and this Court reversed the Decree of the Circuit Court of Appeals and affirmed that of the District Court. Hence, the only thing determined in that case was that the "taxation of costs * * under the principles, rules and practice in equity" does not permit the allowance of costs as between solicitor and client. In other words, the term "costs" is not broad enough to permit the awarding of expenses and attorneys' fees as incident to the judgment. Judge Van Valkenburgh was then the district judge and he held as follows:

> "'The right to tax costs as between solicitor and client depends upon one, or both, of two theories recognized in the law:
>
> "'First. Where gross charges of fraud and misconduct have been made and not sustained, and where the main ground of the suit is shown to be false, unjust, vexatious, wanton or oppressive. In other words, where charges amounting to scandal and a misuse of the courts are made and not sustained, but found to be baseless and unwarrantable.

> "'Second. Where a fiduciary relation exists between the parties, such as trustee and *cestui que* trust, or pledgor and pledgee, or principal and agent, and where the fiduciary is put to expense in the defense of an unfounded suit brought against him by such *cestui que* trust, or pledgor or principal, especially where charges of gross fraud and misconduct have been made against a fiduciary and have been found baseless and unwarrantable'." (28 Fed. (2d) 234.)

In other words, lack of good faith in bringing the action is not enough. The case must be one where the plaintiff therein has made, but failed to sustain, gross charges of fraud and misconduct. There was no such charge against Bu hhalter. In *Kansas City Southern Ry. Co. v. Guardian Trust Company, supra,* counsel for the trust company filed a brief in this Court in which they sought to sustain the decree of the Circuit Court of Appeals. In that brief, which appears as a part of the case as reported, it is claimed that the practice in this country is to impose costs as between solicitor and client as indemnification for "litigation which is wholly baseless and unwarranted". A long list of cases is cited in alleged support of that proposition. We have examined them all with care and not a single one supports it. There simply is no authority in this country for awarding such costs merely because the Court finds that the suit is not brought in good faith.

In its opinion denying petition for rehearing herein the Circuit Court of Appeals regards the *Guardian Trust Company* case as unimpaired authority and as an exhaustive treatise on the subject. And in that opinion it is said, "The rules of the High Court of Chancery of England have been adopted by the courts of the United States" and "such rules allowed costs as between solicitor and client where the litigation is false, unjust, vexatious, wanton, or oppressive". We respectfully assert that the Circuit Court of Appeals was in error in both of said statements.

(1) The rules of the High Court of Chancery of England are no longer followed in this country.

In the equity rules first promulgated by this, the Supreme Court of the United States, in February, 1822, we find the following:

"RULE XXXIII.

> "In all cases where the rules prescribed by this Court, or by the Circuit Court, do not apply, the practice of the Circuit Courts shall be regulated by the practice of the High Court of Chancery in England."
>
> *Hopkins Federal Eq. Rules*, 7th ed., p. 42.

Twenty years later, this Honorable Court considered that equity practice in this country had become sufficiently well established that the rules of the High Court of Chancery should be regarded "not as positive rules, but as furnishing just analogies to regulate the practice". Accordingly, in lieu of Rule

XXXIII above quoted there was substituted Rule XC of the Rules of 1842, which reads:

> "In all cases, where the rules prescribed by this Court, or by the Circuit Court, do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the Court is held, not as positive rules, but as furnishing just analogies to regulate the practice."
>
> *Hopkins' Federal Equity Rules*, 7th ed., p. 61.

The new Federal Equity Rules, adopted in 1912, no longer refer us to the English practice for any purpose. Accordingly, whatever the practice may be, or may once have been, in the Old Country, that practice is no longer any authority for awarding expenses of litigation or attorney's fees in this country.

(2) But it was never the practice of the High Court of Chancery to allow "Costs as between solicitor and client where the litigation is false, unjust, vexatious, wanton or oppressive".

We have examined with care, all of the English cases cited by Judge Booth in alleged support of his opinion in the *Guardian Trust Company* case, *supra*, as well as all others which we have been able to find. None of them supports that opinion. The only one which passed squarely upon the point is *Turner*

v. Collins, L. R. 12 Eq. Cas. 438, and that is directly opposed to the conclusion of Judge Booth. That case was a suit by a beneficiary against the trustees and other beneficiaries. In delivering his opinion, the Vice-Chancellor said:

> "I came to the conclusion that the litigation was as unjustifiable as any I have ever had before me."

But he also concluded in his opinion:

> "I am sorry to come to the conclusion in this case that it is not in my power to give the defendants beneficially interested their costs as between solicitor and client. When the case was heard before me, I expressed a strong desire to do so, feeling that it was one in which I ought, if possible, to make the costs a complete indemnity. But I am now satisfied that it is not the course of the Court to make such an order in dismissing a bill, except where the parties are in a fiduciary position, or where there is something in the nature of scandal, such as gross charges of fraud which are not sustained."

The Vice Chancellor then reviews the authorities which imped him to that conclusion. He did, however, allow such costs to the trustees but the Court of Appeals in Chancery reversed even that part of the decision, saying, "the trustees will have their costs from the plaintiff, but only as between party and party". (7 Ch. App. 329.)

There is no scandal, no charge of fraud in the bill filed by petitioner Rude. There is no fiduciary relation between him and Buchhalter. Hence, there was no basis for charging Rude with Buchhalter's expenses and attorneys' fees.

We now briefly refer to the other English cases upon which Judge Booth relied. It will be seen that in all of them there was either a fiduciary relation or charges of fraud, scandalous matter, or that the point now under consideration was not involved.

Andrews v. Barnes, 39 L. R. Ch. Div. 133, was a suit against trustees and costs as between solicitor and client were allowed because otherwise the trustees' expenses would have depleted the trust fund.

In *Mordue v. Palmer*, L. R. 6 Ch. App. 22, there was a "fiduciary relation between the parties".

In *Brown v. Burdett*, L. R. 40 Ch. Div. 244, it was held that unnecessary costs of litigation could not be taken out of the estate of the decedent.

Johnson v. Telford, 3 Russ. 477, was a case holding that even a trustee may not in every instance have his solicitor's fees taxed as costs against the trust estate.

Eady v. Elsdon, 70 L. J. K. B. 701, 84 L. T. R. 615, was a case involving the costs of a solicitor appointed as a guardian *ad litem* for an infant. Moreover, costs as between solicitor and client were disallowed.

In re Brown, a Solicitor, L. R. 4 Eq. Cas. 464, involved the right to pay the fees of a "solicitor for

a trustee under a will" out of the trust estate. Moreover, as the report of the case shows, this matter was regulated by statute, *6 and 7 Vict.*, C. 73.

So in *Eland v. Medland*, L. R. 41 Ch. Div. 476, the question was whether trustees could be allowed their costs out of the trust estate. It does not appear that costs between solicitor and client were involved.

In *Halsbury's Laws of England*, Vol. 26, p. 798, cited by Judge Booth in 28 F. (2d) 240, it is said concerning the power of a court of equity by special order to award costs as between solicitor and client,

> "Such orders are usually made in favor of trustees and personal representatives."

Re Davies; Jenkins v. Davies, 64 L. T. R. 824, also involved costs in a suit for construction of a will.

In *Simpson v. Malherbe and others*, 4 Giff. 707, the suit was instituted for a purpose other than that disclosed by the bill and in collusion with some of the defendants. There were charges of fraud.

In *ex parte Simpson*, 15 Ves. Jr. 476, a solicitor filed a false and *scandalous* affidavit in a bankruptcy proceeding. *He* was ordered to pay all the costs.

Dungey v. Angove, 2 Ves. Jr. 303, was another collusive suit so scandalous that the plaintiff and his solicitor were ordered to pay all the expenses and the solicitor to show cause why his name should not be struck off the roll.

In *Courand v. Hanmer*, 9 Beav. 3, a Receiver was allowed his expenses out of the fund.

Fane v. Fane, L. R. 13 Ch. Div. 228, was also a suit by a *cestui que* trust against the trustee. Plaintiff was required to pay the trustee's expenses.

Surely the decision of the Eighth Circuit, Court of Appeals, in the *Guardian Trust Company* case is seriously impaired when that Court, to support its unprecedented decision, was driven to the supposed English practice, no longer followed in this country, and, as we have seen, not actually ever existing even in England.

There is no American authority for the allowance of expenses and attorney's fees, or either, in a case of this character. It is stated in the *Guardian Trust Company* case, 28 Fed. (2d) at page 241, that the state courts have awarded such expenses, but such is not the case. Two cases are cited in support of that statement, *Danbury v. Robinson*, 14 N. J. Eq. 324, which mentions merely "costs" but awards none, and *Thome v. Allen*, (Ky.) 70 S. W. 410, and 71 S. W. 431. In the latter case there was a trust estate and the allowance was to the trustee.

There is nothing in *Trustees v. Greenough*, 105 U. S. 527, which supports the conclusion of the Circuit Court of Appeals in the present suit. That case simply reaffirmed the well-established doctrine, as stated by Mr. Justice Bradley in the fourth headnote, that,

> "One jointly interested with others in a common fund and who in good faith main-

> tains the necessary litigation to save it from waste and destruction, and secure its proper application, is entitled, in equity, to reimbursement of his costs as between solicitor and client, either out of the fund itself or by proportional contribution from those who receive the benefit of the litigation."

The mere fact that the Court has control over the fund does not authorize the payment therefrom of counsel fees and other expenses. Such payment is not authorized except in cases where the expenses incurred have been for the benefit of all having such interest.

15 C. J. 105.

Kimball v. Atlantic States L. Ins. Co., 223 Fed. 463.

Gund v. Ballard, 80 Neb. 385.

Ryckman v. Parkins, 5 Paige's Ch. Reps. (N. Y.) 543.

In the case last cited the Chancellor said:

> "As between party and party, the counsel for the complainant has in no case a right to be paid extra counsel fees out of a fund belonging to a defendant, except where the counsel has been employed to obtain or create such fund for the joint benefit of both parties. Where interests of the parties are adverse, nothing beyond the legal taxable costs can be allowed by one party against the other."

Conclusion on This Branch of the Case.

As will hereinafter be more fully shown, a court of equity is without power to impose arbitrary conditions. The Court must find its authority in established equitable principles which may not be expanded or ignored according to the individual opinion of the judge as to what would be just in the particular case. It is contrary to the established practice to compel one party to pay the expenses incurred by his adversary. This Court has so declared in *Oelrichs v. Williams*, *Arcambel v. Wiseman* and *Hauenstein v. Lynham*, *supra*. The decree of the Circuit Court of Appeals awarding respondent Buchhalter his counsel fees and other expenses is clearly erroneous, as well as in conflict with the Constitution, and should be reversed.

Point C.

The doctrine that a Court of Equity may grant relief only upon conditions is inapplicable.

1. Conditions may not be arbitrary, but must be "warranted by settled principles of equity jurisprudence".

Lurton, J., in Compton v. Jesup, 68 Fed. 263, 316; 15 C. C. A. 397.
Pomeroy's Eq. Jur. (4th ed.) Sec. 386.
Mantermach v. Studt, 240 Ill. 464, 469.
Lindell v. Lindell, 150 Minn. 295, 299.
Alexander v. Shaffer, 38 Nebr. 812, 816.

In the case last cited the Supreme Court of Nebraska said:

"The maxim that 'He who seeks equity

> must do equity' has never been so applied as to justify a court in imposing arbitrary conditions in order to carry out what, in the individual opinion of the chancellor, would amount to substantial justice between the parties. The rule only requires the plaintiff to do 'equity'; that is, to do what upon established legal principles he should be required to do."

Since it is contrary to the settled principles of equity jurisprudence to compel one party to pay his adversary's expenses of litigation, the Circuit Court of Appeals was without power to do so under the guise of imposing conditions.

2. Even where conditions are proper they may not be absolute. The party should have his option to reject the whole decree.

> 21 C. J. 668, Equity, sec. 849.
> *1 Pomeroy's Eq. Jur.* (4th ed.) sec. 385.
> *Gage v. Thompson*, 161 Ill. 403, 407.
> *Alexander v. Merrick*, 121 Ill. 606, 614.

In the case last cited the Supreme Court of Illinois said:

> "Although the relief may be granted on condition that complainant pays the money, yet he can not be compelled to pay unless he desires the relief. The correct practice is for the Court to impose equitable terms, and, in case the complainant declines or refuses to comply with those terms, to dismiss his bill."

Despite the opinion of the Circuit Court of Ap-

peals denying petition for rehearing (R. 303) to the contrary, we submit that the decree herein is absolute and in no wise conditional. It is true that Buchhalter's expenses and attorney's fees are ordered to be paid out of Rude's share of the funds and bonds in escrow, and not otherwise. But there are $90,000 in bonds besides interest and principal which has been paid. Petitioner Rude owns over one-half thereof. The amount claimed by Blount, Silverstein & Rosner under their attachment lien is only $10,000, interest and court costs (R. 137, 139, 157). Accordingly Rude's share of the escrow is much more than ample to pay all prior charges, liens claimed and any expenses and attorney's fees. Therefore payment out of his share of the escrow is the same as payment out of pocket. If this is not so, if these expenses and attorney's fees awarded Buchhalter require all of Rude's share of the funds and bonds in escrow, then indeed the Circuit Court of Appeals has done indirectly what it expressly held could not be directly done, namely, it has awarded Rude's interest in the escrow funds and bonds to Buchhalter. At all events the decree is absolute and not conditional. It absolutely requires payment of Buchhalter's expenses and attorney's fees out of Rude's property and gives Rude no right to reject the relief awarded or to refuse to perform the decree. In this respect the decree is clearly erroneous because, according to equitable principles and practice "the conditions of the relief do not constitute an affirmative decree against plaintiff. He may perform them or not at his option."

21 C. J. 668, and other authorities, *supra.*

Point D.

The Circuit Court of Appeals erred in holding that petitioner had not brought his suit in good faith.

Buchhalter, in his requested findings of fact and conclusions of law (R. 42), and in his motion to amend final decree (R. 45), asked the trial court to hold that Rude was in court with unclean hands, that Rude must have known that his suit had no foundation in fact, that his testimony was in large part false. This the trial court refused to do, which amounts to an affirmative finding that Rude's suit was *not* brought in bad faith. But the Circuit Court of Appeals made a contrary finding (R. 275) and said, "In equity the appellate court is not bound by the findings of the trial court" (R. 306).

It is true that the findings of the trial court are not *conclusive* on the appellate court. Nevertheless, such findings are presumptively correct and will not be disturbed unless the trial court has either misapprehended the evidence or gone against the clear weight thereof.

Medsker v. Bonebrake, 108 U. S. 66.
Tilghman v. Proctor, 125 U. S. 136.
American Rotary Valve Co. v. Moorehead, 226 Fed. 202, 141 C. C. A. 129 (7th Cir.).
Fineup v. Kleinman, 5 Fed. (2d) 137 (8th Cir.).

While space will not permit the clearest possible demonstration herein that the evidence was much more than ample to show good grounds for institu-

tion of the suit, if this Honorable Court's other pressing duties will permit the reading of the portions of the record to which we now refer, it will there conclusively appear that there was an agreement that Rude was to have cash out of the proceeds of the sale to Binstock and was not to be required to accept any bonds. Not only Rude, but Buchhalter's witness Block, and even Buchhalter himself, testified that, when Buchhalter wanted to sell to Binstock, Rude said he would not accept any bonds but would not stand in the way of a deal; that, if Buchhalter wanted to sell, he might do so provided Rude be given all cash paid by Binstock, and Buchhalter's note for the balance to which Rude would be entitled (R. 63, 114, 120, 121, 122, 181). Rude then left Colorado and Buchhalter concluded the sale to Binstock in Rude's absence. By making such sale under such circumstances, Buchhalter accepted Rude's conditions and thereby became bound to pay Rude the cash and give him a note for the balance. The agreement alleged in the bill was but a modification of Buchhalter's already existing obligation to give Rude cash, not bonds. *Moreover, Buchhalter was impeached by four reputable witnesses who testified that his reputation for truth and veracity was bad* (R. 163, 170, 171, 172).

In *Medsker v. Bonebrake*, 108 U. S. 66, *supra*, this Court reversed a decree sustaining exceptions to a *master's* report because there was sufficient evidence to sustain the report and the master, before whom the witnesses had personally appeared, had a better opportunity to judge of their credibility. So

here, the District Court which heard the testimony in open court, had a much better opportunity to judge as to Rude's good faith. The trial court having determined upon sufficient evidence that the petitioner Rude did not bring his suit in bad faith, the Circuit Court of Appeals erred in finding to the contrary.

The same is true of the finding of the Circuit Court of Appeals that Rude's testimony was materially false (R. 275). The only testimony contradicting Rude's evidence as to the agreement sued on, was that of the impeached Buchhalter. While it is true that Blount, Silverstein & Rosner testified that the $67,500 note was given under circumstances different from those related by Rude, *the suit was not on the note*, the note was set out merely "by way of background" (R. 271) and was at most a collateral matter.

Point E.

The Circuit Court of Appeals erred in holding that "it was the assertion of a false and groundless claim that prevented a distribution of the fund without the aid of equity".

The above quoted portion of this point is taken from the opinion of the Circuit Court of Appeals denying petition for rehearing (R. 305). We respectfully submit that such statement is contrary to the evidence and inconsistent with other portions of the opinions of that Court. Both the District Court and the Circuit Court of Appeals held that the funds and bonds in escrow are owned by Rude and Buchhalter in the proportion that $61,000 bears to

$53,922 (R. 44, 275). The documentary evidence conclusively supports such holdings (Exhibit B, R. p. 196). Nevertheless, Buchhalter contended at the trial (R. 130) and in the Circuit Court of Appeals (R. 52, Par. 15) that his interest was as $59,000 bears to $61,000. In his answer Buchhalter alleged three times that his interest in the escrow was equal to Rude's (R. 16, 19). At another place he alleged that his interest was "approximately" equal to Rude's (R. 16). At still another place Buchhalter alleged that his and Rude's respective interests were subject to possible minor accountings between them (R. 17). In the Circuit Court of Appeals Rude asked that the funds and bonds be distributed between him and Buchhalter. Buchhalter resisted this (R. 304).

The decree of the Circuit Court of Appeals apportions the funds and bonds "between I. Rude and Joseph Buchhalter in the proportion that $61,000 bears to $53,922, *subject to any items of accounting that may be established between them.* Accordingly it was never possible for Rude to obtain his just proportion without resort to equity. An accounting has always been and still is necessary. The Circuit Court of Appeals was, therefore, manifestly wrong in holding that the assertion of Rude's claim to cash prevented distribution without the aid of equity. If Rude's demand for cash put Buchhalter to expense, Buchhalter's demand for more than his just share likewise put Rude to expense. Buchhalter not only claimed *more* than his proportionate share on the basis of the respective amounts invested, but he

also put Rude to great expense in defending against Buchhalter's unconscionable, abhorrent and wholly unfounded claim to *all* of the funds and bonds in escrow.

Point F.

The Circuit Court of Appeals erred in disregarding petitioner's motion to dismiss Buchhalter's appeal and in awarding respondent Buchhalter affirmative relief, at petitioner's costs.

Of the four grounds of the motion (R. 266-268) two are so unquestionably sound that we discuss them only.

(1) Indispensable parties were omitted. The First National Bank of Denver is the escrow holder of these funds and bonds, but was not made a party to the appeal. And yet Buchhalter prayed in his assignment of errors "that the First National Bank of Denver, Colorado, as escrow-holder of said funds and bonds, be directed and required to turn over and deliver unto this defendant (Buchhalter) all and singular, the same" (R. 53). But the bank being absent, the Circuit Court of Appeals had no jurisdiction to give it any such direction or to order it to do anything else. The bank is not bound by the decree and may refuse to perform it if it sees fit. Moreover, the garnishee summons issued out of the state court requires the bank as garnishee to hold these funds and bonds subject to the order of that court. The Circuit Court of Appeals surely had no jurisdiction to order an absent party to disobey the process of another court. It is no answer to say that no such thing was attempted. The point is that

the Circuit Court of Appeals had no jurisdiction to proceed at all. Neither is it any answer to say that all necessary parties were before the Court in Rude's appeal. No relief was granted in Rude's appeal. The decree of the District Court was affirmed (R. 277), while in Buchhalter's appeal that decree was reversed with directions (R. 276).

The other defendants, Blount, Silverstein & Rosner have an attachment lien upon these same funds and bonds. They likewise were not made parties to Buchhalter's appeal. But Buchhalter, one of the defendants in the attachment suit, sought to destroy that lien by having the Circuit Court of Appeals deliver the attached property to him. In the absence of the plaintiffs in the attachment suit, the Circuit Court of Appeals was clearly without jurisdiction to make any order respecting the disposition of the attached property.

Davis v. Merc. Trust Co., 152 U. S. 590, wherein this Court said:

> "All parties to the record, who appear to have any interest in the order or ruling challenged, must be given an opportunity to be heard on such appeal."

(2) Buchhalter's appeal was frivolous.

An appeal is frivolous "either because concluded by previous authority or because of its absolutely frivolous nature."

Deming v. Carlisle Pack. Co., 226 U. S. 102, 105, 107.

Wagner Elec. Mfg. Co. v. Lyndon, 262 U. S. 226.

Pennywit v. Eaton, 15 Wall. 382, 21 L. Ed. 140.

That Rude, having asserted but failed to sustain a lien, was not thereafter precluded from asserting ownership, has long been settled.

Wm. W. Bierce, Ltd., v. Hutchins, 205 U. S. 340, 51 L. Ed. 828, 833.

Barnsdall v. Waltemeyer, 142 Fed. 415 (C. C. A. 8th Cir.).

Water, Lgt. & Gas Co. v. City of Hutchinson, 160 Fed. 41 (C. C. A. 8th Cir.).

Friederichsen v. Renard, 247 U. S. 205, 62 L. Ed. 1075.

That Buchhalter's appeal was "absolutely frivolous" conclusively appears from his own answer wherein he alleged no less than eleven times that Rude was a joint owner of the paper mill and in the proceeds of its sale (R. 14, 15, 16, 17, 18, 19, 20). That Buchhalter could not thereafter obtain a decree awarding himself full and complete ownership is so obvious that his appeal, wherein he sought such a decree and that only, was clearly "absolutely frivolous". His appeal should have been dismissed, but the decree of the Circuit Court of Appeals awards him other relief, which he resisted, and taxes the cost of printing the record to Rude.

Point G.

The Circuit Court of Appeals erred in awarding any relief to respondent the First National Bank of Denver.

The decree also awards the bank its expenses and attorney's fees. It might have been proper for the District Court to have done so because the bank is in effect the trustee of these funds and bonds. But the District Court did not do so and expressly refused the bank attorney's fees (R. 43). The bank did not appeal, was not party to Buchhalter's appeal, made no appearance in Rude's appeal but was awarded this relief in Buchhalter's appeal. The decree of the District Court is therefore *res judicata* that no expenses or attorney's fees can be recovered by the bank. This is a comparatively minor matter but it serves to emphasize the errors into which the Circuit Court of Appeals fell.

It seems to us that Buchhalter also is precluded from recovering either expenses or attorney's fees for the same reason, i. e., failure to *secure* them in the District Court and failure to *ask* them in the Appellate Court. While he asked the District Court for attorney's fees in behalf of the bank (R. 43), he *never* claimed any in behalf of himself. In addition to the findings of fact prepared by Buchhalter and wherein he asked the District Court for everything to which he claimed to be entitled, Buchhalter also filed below his Motion to Amend Final Decree wherein no mention of expenses or attorney's fees is made (R. 45). The one thing he sought (aside from dismissal of the bill) in the District

and Appellate Courts was Rude's interest in the escrow securities.

In any view of the case Buchhalter should not have been given something which he has never even claimed and upon which no error was assigned and upon which no hearing was ever had.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the errors complained of, including the violation of the Federal Constitution, may be corrected, and to that end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Tenth Circuit, and finally reverse it.

ERNEST MORRIS,
CASS E. HERRINGTON,
C. E. WAMPLER,
CASS M. HERRINGTON,

ADDITIONAL AUTHORITIES.

In contemplation of law the fees prescribed in the fee bill are full indemnity for the litigation and, while a court of equity has discretion to award, withhold or apportion costs, the *amount* of costs which the Court may award is limited by the statute.

Henkel v. Chicago, St. P. M. & O. R. Co. (Feb. 1932), —— U. S. ——, 76 L. Ed. p. 334. Advance Opinions 1931 Term.

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Bone v. Walsh Const. Co., 235 Fed. 901, cited in the Henkel case.

Doddridge County Oil & Gas Co. v. Smith, 173 Fed. 386.

Whitney v. Jersey Shore Borough, 266 Pa. St. 537.

Smith v. Equitable Trust Co., 215 Pa. St. 413.

Winton's Appeal, 87 Pa. St. 77.

Newton Rubber Works v. De Las Casas, 182 Mass. 436.

Rowland v. Maddock, 183 Mass. 360.

Fuller v. Trustees, 252 Mass. 258.

Conaughty v. Saratoga County Bk., 92 N. Y. 401.

Metropolitan Life Ins. Co. v. Kinsley, 269 Ill. 529.

Constant v. Matteson, 22 Ill. 546.

And the exception whereunder equity compels others to contribute their just portion of the expenses of one who has secured or preserved a common fund for the benefit of all, does not apply where the litigation is adversary throughout.

Winton's Appeal, supra.

Whitney v. Jersey Shore Borough, supra.

Dunlop v. McGehee's Exr., 139 Va. 643, 124 S. E. 199.

Eckford v. Borough of Atlanta, (Ga. 1931), 160 S. E. 773.

The courts of Colorado have consistently and always held that even the legislature has no power

under the state Constitution to enact a law requiring one party to pay another's attorney's fees.

Pacific Life Co. v. Van Fleet, 47 Colo. 401.

Antlers Park Regent Mng. Co. v. Cunningham, 29 Colo. 284.

Campbell v. Los Angeles Gold Mine Co., 28 Colo. 256.

Davidson v. Jennings, 27 Colo. 187.

Perkins v. Boyd, 16 Colo. App. 266.

Burleigh Bldg. Co. v. Merchant Brick & Bldg. Co., 13 Colo. App. 155.